

JUAB COUNTY
OFFICE OF THE COUNTY ATTORNEY



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May 6, 2003

Rex Rowley
Bureau of Land Management
Fillmore Field Office
35 East 500 North
Fillmore, Utah 84631

RE: Juab County RS 2477 Road

Dear Mr. Rowley:

This is in reference to a letter you sent to Lawrence Fahn on April 15, 2003 concerning the road leading from the Weiss Highway to his mining claim in Section 5, Township 12 S, Range 6W. This office and the Juab County Commission have a hard time understanding why you are charging Newco Guyana (hereinafter "Newco") for the gravel used on that road.

As previously stated in letters sent to you from this office (see letters dated January 10, 2002 and November 22, 2002), Juab County contracted with Newco to improve the county's RS 2477 right-of-way from the Weiss Highway to the mine. The county claims the road as a public RS 2477 right-of-way. The county improved the road under its RS 2477 rights. The county provided the gravel for that improvement from its free use permit pit (see attached Permit, No. UTU-072889) and Newco provided the labor, machinery, and manpower according to an agreement between the county and Newco. In your letters to Mr. Fahn, dated November 29, 2001 and April 15, 2003, you recognized that the gravel was taken from Juab County's Free Use Permit Gravel Pit, Permit Number UTU-072889.

Our question is: if the County improved a public right-of-way, under its RS 2477 rights, using gravel from its free use permit pit, why is the BLM charging Newco for that gravel?

When the State of Alaska was attempting to facilitate construction of the Alaskan pipeline, environmental groups sought to stop the project through lawsuits. That project was to involve the use of about 34 million cubic yards of gravel, taken from 234 gravel pits located along the pipeline route. Essentially, Alyeska Pipeline Service Company, the private company building the pipeline, was going to build a gravel road the entire length of the pipeline. Because of the problems with permafrost and the need to have a stable surface from which to construct the pipeline, the gravel was to be compacted to a depth of from 18 inches to five feet.

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DIV. OF OIL, GAS & MINING

Environmental groups sued to stop the project. In *Wilderness Soc. v Morton* (1973) 156 US App DC 121, 479 F2d 842, 4 Env't Rep Cas 1977, 3 ELR 200855, the Court recognized that a state or one of its subdivisions could use gravel from free use pits for public projects even when those projects were carried out by private, for-profit entities. The Court stated that Congress intended for the state to pay for the gravel only when the state itself was using the gravel in a profit-making enterprise. The Court said:

As to the remaining issues in these cases, our holding is as follows. The Secretary of the Interior has authority to issue to the State of Alaska rights-of-way for a state highway, for several public airports, and for the free use of gravel for these facilities, *even though the facilities will probably be used primarily for the construction, maintenance and operation of the proposed pipeline.* Id., 848 (emphasis added).

Appellants [those who opposed the project] charge that, since the ultimate purpose of the road and airports is to facilitate construction of the pipeline, the use is for "commercial or industrial" purposes within the meaning of 30 U.S.C. § 601 (1970), and therefore excepted from the free use exemption. As indicated earlier, however, both the declared and the real State intention with respect to the road and airports is to construct public facilities, and the fact that such facilities will incidentally, or even primarily, initially benefit private industrial or commercial activities does not detract from the public, noncommercial, nature of the facilities themselves. *It seems reasonable to assume that in enacting the exception to the free use exemption Congress intended to exact a price from the state only when the state itself was using the gravel in some profit-making enterprise.* There being no indication that this is the case here, we hold the free use permits valid. Id., at 884 (emphasis added).

The Court clearly stated that a project is not exempted from free use just because a private company is involved in the project. In fact, quoting a U.S. Supreme Court case, the Court stated that even where a road might not be built, but for the intervention of a private company, that fact does not taint the arrangement between the state and the private company. In fact, it supports the arrangement's reasonableness.

There can be no doubt that but for Alyeska this road would not be built at the present time. But rather than tainting the arrangement between the State and Alyeska, this fact merely supports its reasonableness. As Mr. Justice Jackson said in *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 211, 87 L. Ed. 716, 63 S. Ct. 534 (1943): "It has long been both customary and lawful to stimulate private self-interest and utilize the profit motive to get needful services performed for the public. The State appears to be doing no more than that." Id., at 884.

On the road in question here, Juab County did not use the gravel in some profit-making enterprise. Rather, the County made an arrangement with a private company, Newco, to improve a County right-of-way – a public road. To use the reasoning and wording of the Court, the fact

that the road will incidentally, or even primarily, initially benefit private industrial or commercial activities (Newco) does not detract from the public, noncommercial, nature of the road itself.

Juab County provided the gravel and Newco provided the labor, just as the State of Alaska provided the gravel and Alyeska performed the labor. Alaska and Alyeska built a road hundreds of miles long, ranging from 18 inches to five feet deep using 34 million cubic yards of gravel, taken from 234 gravel pits. Juab County and Newco improved an already existing road that, by your estimates, was 4500 feet long and six inches deep using roughly 888 cubic yards of gravel taken from one pit. If Alaska and Alyeska were allowed to use that much gravel from that many free use permit pits, free of charge, surely Juab County and Newco should not be charged either.

Sincerely,



Jared W. Eldridge
Juab County Attorney

JUAB COUNTY
OFFICE OF THE COUNTY ATTORNEY



DAVID O. LEAVITT
COUNTY ATTORNEY

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PRO

ANNMARIE T. HOWARD
Deputy County Attorney

January 10, 2002

Rex Rowley
Bureau of Land Management
Fillmore Field Office
35 East 500 North
Fillmore, Utah 84631

RE: Juab County RS 2477 Road

Dear Mr. Rowley:

Juab County has been informed of concerns you have concerning certain work which was performed on a road in sections 5 and 8, Township 12S, Range 6W. The road leads from the Weiss highway to a mine operated by Newco Guyana Inc.

We apologize for any concern the work may have caused you and realize that the County should have informed you of its intentions prior to commencing work on the road.

Juab County claims a right-of-way under Revised Statutes 2477 over the road northward from the Weiss Highway to within a couple hundred yards from the mine. Juab County informed the BLM several years ago of our claim to the road when we submitted the County General Plan, which included a map of currently claimed roads. Given that right-of-way, the County has the right to make reasonable and necessary improvements within the boundaries of the right-of-way (see *Sierra Club v. Hodel*, 848 F.2d 1068, 1084 (1988)).

As far as the scope of the right-of-way, Utah state law, historically, and federal court cases, recently, have declared that the scope of a county's right-of-way is that which is reasonable and necessary to ensure safe travel for the traditional uses to which the right-of-way was put. Courts have also said that the "rights-of-way should not be restricted to the actual beaten path, but should be widened to meet the exigencies of increased travel. More specifically, they should be wide enough to allow travelers to pass each other." (see *Sierra Club v. Hodel*, 848 F.2d 1068, 1083-84 (1988) and *United States v. Garfield County*, 122 F. Supp.2d 1201, 1216 (2000)).

A year ago, Newco and the County reached an agreement regarding the improvements to the road. In general terms, Newco agreed to make the improvements to the road according to County

specifications if the County provided the material.

Even if the road were not an RS 2477 road, we still are left with some question as to why the BLM would require a Title V process on this road since such an action clearly violates federal law and BLM policy. 43 CFR 3809.420(b)(1) states that "[a]n operator is entitled to access to his operations consistent with provisions of the mining laws. Where a notice or plan of operations is required, it shall specify the location of access routes for operations and other conditions necessary to prevent unnecessary or undue degradation. The authorized officer may require the operator to use existing roads to minimize the number of access routes, and if practicable, to construct access roads within a designated transportation or utility corridor."

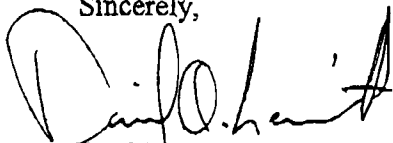
Further, the comments on the regulations promulgated in 43 CFR Part 3800 state: "Another comment was concerned whether rights-of-way for access to mining claims would require approval under Title V of the Federal Land Policy and Management Act. Access for all purposes of ingress and egress to unpatented mining claims will not be regulated under the provisions of Title V. One comment suggested stronger controls over access including maintenance fees and use of existing roads. When non-exclusive access is involved, the Bureau of Land Management may not charge a fee for access. This relates back to the mineral laws themselves which state that Federal lands shall be "free and open." Use of existing access will be encouraged to the greatest extent possible. Failure to use existing access may result in building an unnecessary road and, thus, creating unnecessary or undue degradation."

Newco has the right, under mining laws, to access the mine and carry material to and from the mine using heavy equipment, trucks, etc. Given that the road in question is the most direct route from the Weiss highway to the mine, the County thought it wise to encourage Newco to use the road rather than some other more circuitous and lengthy route such as the road that encircles Coyote Knoll from the north.

As you know, the terrain in the area is full of sand and dirt. Given the amount, size, and weight of the vehicles that Newco would be using traveling to and from the mine, failure to gravel the road would cause environmental damage, including erosion, disturbance of the surrounding soil and plants, and the likelihood of large amounts of dust, sand, and dirt being kicked up into the air. Graveling the road would help prevent or at least reduce those problems.

Again, Juab County apologizes for not informing the BLM of its intentions earlier. The County affirms it has the right to improve this road, but it certainly had the ability to communicate better. If you have any questions or concerns please let us know.

Sincerely,



David O. Leavitt
Juab County Attorney